Ahmad Mukamal bin Abdul Wahab & Ors v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO C-05–44 OF 2011
APANDI ALI, LINTON ALBERT AND HAMID SULTAN JJCA
19 APRIL 2013

Criminal Procedure — Appeal — Appeal against conviction and sentence — Trafficking in 4,251g of cannabis — Appellants charged, convicted and sentenced for drug trafficking — Whether evidence implicated all three accused — Whether defence ought to be called for all three accused — Dangerous Drugs Act 1952 s 39B(1)(a)

In the present appeals, the appellants were convicted and accordingly, sentenced for trafficking in 4,521g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). In an ambush plan at a restaurant, the agent provocateur ('SP8') had met up with the second and third appellant. The third appellant arrived in a car and waited outside the restaurant and as observed by SP7, two people were inside with him in the car. The police ambushed the appellants as the second appellant was talking to the third appellant and the first appellant was seen throwing out a packet of drugs out of the car. In her defence, the second appellant denied any knowledge of any drug trafficking and further testified that the third appellant had driven her to the restaurant and left her there before coming back with the first appellant. The second appellant contended that the third appellant had passed her a mobile phone and instructed her to call the number in the phone, to meet him up and inform him to meet at the Gombak Toll.

Held, allowing the second appellant's appeal; dismissing the first and third appellants' appeal:

(1) The first and third appellants were caught red-handed with the drugs sufficient to attract a charge under s 39B(1)(a) of the DDA. There was no favourable evidence to rebut the charge on balance of probabilities. The first and third appellants' convictions and sentences were affirmed (see paras 5).

(2) There was no evidence implicating the second appellant in the offence. The conviction and sentence against the second appellant was set aside and the second appellant was acquitted and discharged. There was nothing inherently incredible about the second appellant's story which lacked elements of the offence, in particular, custody, control and knowledge. Had the trial judge applied maximum evaluation test at the

prosecution stage in respect of the elements of the offence, the defence ought not to have been called for the second appellant (see paras 6–7).

[Bahasa Malaysia summary

Dalam rayuan ini, perayu-perayu telah disabitkan kesalahan dan sewajarnya, dihukum kerana mengedar 4,521g ganja, suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Dalam pelan serangan hendap di sebuah restoran, ejen perangkap ('SP8') telah bertemu dengan perayu kedua dan ketiga. Perayu ketiga tiba di kereta dan menunggu di luar restoran dan seperti yang diperhati oleh SP7, dua orang berada di dalam kereta bersamanya. Polis menyerang hendap perayu-perayu apabila melihat perayu kedua telah bercakap kepada perayu ketiga dan perayu pertama telah dilihat membuang sebungkus dadah keluar dari kereta. Dalam pembelaannya, tertuduh kedua menafikan sebarang pengetahuan mana-mana pengedaran dadah dan seterusnya memberi keterangan bahawa perayu ketiga yang telah mendorong beliau untuk ke restoran dan meninggalkannya di situ sebelum kembali dengan tertuduh pertama. Perayu kedua berhujah bahawa perayu ketiga telah memberikan beliau sebuah telefon bimbit dan mengarahkan beliau untuk memanggil nombor yang terdapat di dalam telefon tersebut, untuk bertemu dengannya dan memaklumkan kepadanya untuk bertemu di Tol Gombak.

Diputuskan, membenarkan rayuan perayu kedua; menolak rayuan perayu-perayu pertama dan ketiga:

(1) Perayu-perayu pertama dan ketiga telah ditangkap secara terang-terangan dengan jumlah dadah yang mencukupi untuk menarik pertuduhan di bawah s 39B(1)(a) ADB. Tidak ada bukti yang menggalakkan untuk mematahkan dakwaan pada imbangan kebarangkalian. Sabitan dan hukuman yang perayu-perayu pertama dan ketiga disahkan (lihat perenggan 5).

(2) Tiada bukti mengaitkan perayu kedua dengan kesalahan itu. Sabitan dan hukuman terhadap perayu kedua telah diketepikan dan perayu kedua dilepaskan dan dibebaskan. Tiada apa-apa yang luar biasa tentang cerita perayu kedua itu yang tidak mempunyai unsur-unsur kesalahan, khususnya, jagaan, kawalan dan pengetahuan. Jika hakim perbicaraan mengaplikasikan ujian penilaian maksimum pada peringkat pendakwaan berkenaan dengan unsur-unsur kesalahan itu, pembelaan tidak sepatutnya dipanggil untuk perayu kedua (lihat perenggan 6–7).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 216–222.

Cases referred to

Mohamed Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 3 CLJ 2073, SC (folld)
PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)
Sochima Okoye v PP [1995] 1 MLJ 538, SC (consd)
Thenegaran a/l Murugan & Anor v PP [2013] 2 MLJ 855, CA (refd)
Tong Kam Yew & Anor v PP [2013] 4 MLJ 888, CA (refd)
Zulkifli bin Md Rodzi v PP [2013] 3 MLJ 745, CA (refd)

Legislation referred to

Criminal Procedure Code s 182A
Dangerous Drugs Act 1952 s 39B(1)(a)
Federal Constitution art 5(1)
Penal Code s 34

Appeal from: Trial No 45A–16 of 2010 (High Court, Temerloh)

Bernard George (Tay, Bernard & Cheong) for the appellant.
Hanif bin Hassan (Hanif Hassan & Co) for the appellant.
Shoba Venu Gobal (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] We heard all the three appeals of the appellants/accused on 11 January 2013 and on the same day dismissed the first and third appellants' appeal and allowed the second appellant's appeal. My learned brothers Mohamed Apandi bin Hj Ali JCA and Linton Albert JCA have read the judgment in draft form and approved the same. This is our judgment in respect of Appeal No C-05–44 of 2011. It must be noted that there is only one appeal number for all the three appeals.

BRIEF FACTS

[2] The appellants were charged for trafficking dangerous drugs under s 39B(1)(a) of the DDA 1952, to be read with s 34. The said charge reads as follows:

> Bahawa kamu bersama-sama pada 9-3-2010, lebih kurang jam 12:30 tengah malam, di kawasan tempat letak R & R Genting Sampah, dalam daerah Bentong, di dalam Negeri Pahang, telah didapati mengedar dadah berbahaya jenis cannabis seberat 4,521 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) akta yang sama dan dibaca bersama Seksyen 34 Kanun Keseksaan.

[3] The main witnesses were SP8, SP6 and SP7 for the prosecution who were the police officers, and were involved in trapping the appellants. SP6 was instrumental in contacting the source person, called Shah to come to Genting Sempah to purchase five kilos of cannabis. SP6 instructed SP8 to be an agent provocateur for purpose of purchasing the cannabis. SP6 saw SP8 and source entering McDonald Restaurant and about 10.30pm saw a woman entering the McDonald Restaurant (later identified as the second appellant).

[4] Subsequently the second appellant, the source and SP8 came out of the restaurant and later the source moved away leaving SP8 and second appellant. Later a Kancil car came, and SP6 saw SP8, the second appellant and the driver of the Kancil later identified as the third appellant. After that the car moved away leaving SP8 and the second appellant. SP7 had followed the car and he was said to have seen two people in the car. SP6 says he saw the car returning to the place SP8 and second appellant was standing and the second appellant spoke to the driver. SP6 then saw the signal from SP8 to take action. And SP6 saw the passenger in the car, later identified as the first appellant throw a packet. All the three appellants were arrested and SP6 seized the packet which contained the drugs.

[5] From the evidence led by the prosecution it was clear that the first and third appellants were caught red handed with the drugs sufficient to attract a charge under s 39B(1)(a) of the DDA 1952. And we have perused the whole of the record of appeal to see whether there was any favourable evidence to rebut the charge on balance of probalities. We find none.

[6] In respect of the second appellant, we do not find any evidence implicating her and the only evidence is the oral testimony of SP8. The learned trial judge though in our view correctly assessing the evidence as a whole failed to consider exh D1, the caution statement of the second appellant which exonerates liability. In consequence the judgment against the second appellant attracts the jurisprudence relating to perverse judgment and also must be seen to be in breach of s 182A of the CPC (see *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888; Cri A No B-05–63 of 2011 (20 March 2013)). The said caution statement, inter alia, reads as follows:

> S. Bagi menjawab soalan saya.
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> J. Saya dilahirkan di Penggerang dan dibesarkan di Felda Lok Heng dalam keluarga yang kucar kacir. Saya bersekolah hanya sehingga darjah enam kemudian saya bekerja di kebun buah-buahan di Punggai, Kota Tinggi Johor. Pada tahun 2000 saya ke Kuala Lumpur untuk mencari pekerjaan baru. Saya telah dapat pekerjaan di Pusat Karaoke Goldmine Maluri Cheras Kuala Lumpur sehingga tahun 2002. Kemudian saya bekerja di Pusat Pendandan Rambut di Cheras sehingga tahun 2003, kemudian saya berhenti kerja dan tinggal dengan teman lelaki saya bernama Shawal bin Hashim,

yang menyara kehidupan saya. Pada tahun 2009 saya bekerja sambilan membantu menguruskan akaun perniagaan sayur Shawal bin Hashim sehingga saya ditangkap polis.

S. Ceritakan kepada saya mengapa kamu ditangkap oleh pihak polis?

J. Pada 08/03/2010 jam lebih kurang 2 petang saya keluar rumah di Kg. Puah bersama Shawal bin Hashim untuk menguruskan hal Insuran di Am Insuran di berdekatan Gombak, seterusnya menguruskan hal pernikahan saya dengan Shawal bin Hashim di pejabat Agama Bangsar Kuala Lumpur. Selesai urusan saya, jam lebih kurang 9 malam Shawal bin Hashim telah membawa saya ke kawasan rehat Genting Sempah dengan kenderaan Produa Kancil. Sampai di Genting Sempah dia telah tinggalkan saya di McDonald Genting Sempah dan dia terus beredar meninggalkan saya, lebih kurang setengah jam kemudian Shawal telah muncul semula di kawasan rehat Genting Sempah bersama seorang kawan lelaki yang saya kenali bernama Boy. Seketika kemudian semasa saya berada berhampiran dengan kereta Produa tersebut berlaku pergelutan dalam kereta dan polis telah ramai mengepung kereta yang dinaiki Shawal dan Boy, kemudian seorang polis wanita telah menangkap saya dan memasang gari pada tangan saya. Saya ditangkap polis kerana saya datang ke Genting Sempah bersama Shawal bin Hashim yang membawa dadah ganja di dalam keretanya.

S. Adakah kamu tahu mengapa kamu ditangkap polis?

J. Tahu, saya ditangkap polis kerana bersama Shawal dengan Boy yang disyaki mengedar dadah ganja.

S. Di mana polis jumpa dadah ganja itu?

J. Saya tak tahu dan saya tak pasti di mana dadah itu dijumpai.

S. Dadah ganja yang polis jumpa itu kepunyaan siapa?

J. Saya tak pasti, mungkin kepunyaan Boy kerana semasa saya datang dengan Shawal pada mulanya dadah tersebut tidak ada dalam kereta.

S. Siapa lagi bersama kamu semasa polis jumpa dadah ganja tersebut?

J. Shawal dengan Boy.

S. Adakah kamu tahu tujuan Shawal bin Hashim bawa kamu ke Genting Sempah pada malam tersebut?

J. Saya tidak tahu, saya hanya mengikutnya sahaja.

S. Sudah berapa lama kamu mengenali Shawal?

J. Lebih kurang lapan tahun sejak tahun 2002.

S. Adakah kamu telah berkahwin dengan Shawal?

J. Belum lagi, dia hanya kekasih saya sahaja.

S. Mengapa Shawal tinggalkan kamu di McDonald pada malam itu?

J. Saya tak tahu, dia beritahu saya yang dia nak jumpa kawannya sekejap dan suruh saya tunggunya di McDonald dan menunggu panggilan teliponnya.

S. Adakah kamu berjumpa sesiapa di dalam McDonald?

J. Ada, seorang lelaki yang saya tidak kenali.

S. Bagaimana kamu boleh jumpa dengannya?

J. Shawal mengarahkan saya supaya masuk ke dalam McDonald dan dia telah memberikan saya satu telepon bimbit dan menyuruh saya menghubungi nombor tersebut dan seorang lelaki di dalam McDonald telah menjawab panggilan saya, dan saya terus ke meja lelaki tersebut.

S. Apakah yang kamu bualkan dengan lelaki tersebut?

J. Shawal memberitahu kepada saya supaya memberitahu kepada lelaki tersebut bahawa 'barang tak boleh naik, kalau nak, jumpa di Tol Gombak'. Kemudian Shawal keluar dari kereta dan berjumpa dengan lelaki tersebut di luar McDonald. Kemudian Shawal masuk semula ke dalam kereta dan tinggalkan saya dengan lelaki tersebut di McDonald.

S. Berapa lama kamu dengan lelaki tersebut menunggu sehingga Shawal muncul semula?

J. Lebih kurang setengah jam.

S. Siapa bersama Shawal semasa dia muncul semula di kawatan rehat Genting Sempah?

J. Shawal muncul dengan kawan lelaki yang saya kenali dengan nama Boy.

S. Siapakah nama sebenar Boy?

J. Saya tidak tahu, yang saya tahu panggilannya sahaja iaitu Boy.

S. Sudah berapa lama kamu mengenali Boy?

J. Baru sahaja lebih kurang tiga bulan.

S. Di mana kamu mula kenal dengan Boy?

J. Dia datang ke rumah saya berjumpa Shawal.

S. Apakah pekerjaan Boy sepanjang kamu mengenalinya?

J. Setahu saya dia menguruskan kedai makan keluarganya di Kg. Puah.

S. Adakah kamu tahu yang Shawal dan Boy terlibat dengan pengedaran dadah ganja?

J. Saya tidak tahu, yang saya tahu mereka hanya menghisap ganja.

S. Di manakah mereka selalu menghisap ganja?

J. Di dalam rumah saya.

S. Adakah kamu juga menghisap ganja?

J. Tidak, saya hanya makan pil Eramin 5.

S. Bila kali terakhir kamu makan pil Eramin 5?

J. Pada hari kejadian jam lebih kurang 6 petang.

S. Dari mana kamu mendapat bekalan dadah tersebut?

J. Saya beli sendiri dari seorang kawan di tempat kerja lama saya.

S. Adakah kamu pernah ditangkap polis sebelum ini?

J. Pernah, kes dadah juga tahun 2006 kes urine.

S. Adakah semua percakapan yang kamu berikan semuanya benar?

J. Ya, semuanya benar.

S. Ada apa-apa percakapan yang hendak kamu tambah atau betulkan?

J. Tiada.

Percakapan dibacakan semula kepada saspek dan saspek turunkan tandatangan.

[7] In our considered view taking all the evidence in totality there was nothing inherently incredible about the second appellant's story. There was also lack of elements of the offence in particular custody, control and knowledge. Had the learned judge applied the maximum evaluation test at the prosecution stage in respect of the elements of the offence we are of the considered view that the defence ought not to have been called for the second appellant. And if the learned judge had properly addressed his mind to the maximum evaluation and beyond reasonable test at the end of the defence case the only result will be an acquittal for the second appellant, (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281).

[8] It is pertinent to note that the apex court had repeatedly asserted that the trial court has a duty and obligation to fairly and justly weigh the defence version and evidence or for that matter a story by the accused to reach a just result, (see *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888; Cri A No B-05–63 of 2011 (20 March 2013)).

[9] In *Mohamed Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073, the Supreme Court had, inter alia, stated:

> Whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v Public Prosecutor* [1963] 1 LNS 82 examine whether even though the court is not satisfied with the defence story, to ask whether in spite of this, the defence *story casts a reasonable doubt on the prosecution case*. (Emphasis added.)

It must be noted here that even though *Radhi*'s case involved trafficking and it is well settled that defence to rebut trafficking must be on the balance of probabilities the threshold requirement to reach that legal burden is not high and it will be sufficient if the defence story creates a reasonable doubt on the prosecution case, as advocated in *Radhi*'s case as well as by Justice Gopal Sri Ram in the case of *Sochima* which is set out below.

[10] The hallmark of any criminal judgment in the administration of criminal justice depends largely on weighing the defence story in the right perspective with that of the evidence of the prosecution. This is so because of the special constitutional protection given to the accused under art 5(1) of the Federal Constitution which reads as follows:

> No person shall be deprived of his life or personal liberty save in accordance with law.

[11] The proposition and the direction in *Radhi*'s case have now reached the status of law in the Administration of Criminal Justice. In *Sochima Okoye v Public Prosecutor* [1995] 1 MLJ 538, Justice Gopal Sri Ram JCA (as he then was) had this to say:

> We agree with Encik Karpal Singh that the judgment when read as whole reveals no separate exercise as that postulated by the decision in *Radhi*. We also agree with his submission that the use of the plural expression 'presumptions' by the learned judge in the passage we have reproduced a moment ago does not amount to a sufficient compliance of what we will call 'the Radhi direction'.
>
> The learned judge, having found the appellant's story about the existence of James Smith to be true, ought to have addressed his judicial mind to the further question as to *whether there was any reasonable doubt raised that Smith was the real trafficker.* (Emphasis added.) Had he done so he may well have held that he was not, in which event our task would have been made that much easier. Unfortunately he did not and it is our view that the failure by the learned judge to administer unto himself the *Radhi* direction renders his ultimate conclusion fatally flawed.
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> In our judgment, the failure of a judge to properly direct himself or in misdirecting himself is to be treated on the same footing as a non-direction or a misdirection by a judge to a jury. *Rameshwar v State of Rajasthan* AIR 1952 SC 54; *Tan Yook Suan v R* [1954] MLJ 116 and *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 are decisions that are authority for this proposition. And in the last mentioned case Edgar Joseph Jr SCJ (now FCJ) stated the principle in the following words:
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> > Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non-direction amounts to a misdirection, for in the words of Pickford J in *R v Bundy* 5 Cr App R 270: '… the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence'.
> >
> > We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

Before us, the learned deputy fairly, and quite properly, conceded that the learned judge was duty bound, in the light of his earlier finding, to administer unto himself the *Radhi* direction. In these circumstances, we had no alternative but to intervene and make the orders we have set out in the opening paragraph of this judgment.

[12] Failure to strictly comply with *Radhi*'s direction by the trial court in assessing the defence case will in actual fact make the judgment nothing but a piece of scrap paper in the light of art 5(1) of the Federal Constitution and s 182A of the CPC (see *Zulkifli bin Md Rodzi v Public Prosecutor* [2013] 3 MLJ 745; Cri A No P-05–424 of 2010 (22 February 2013); *Public Prosecutor v Mohd Aszzid bin Abdullah* [2008] 1 MLJ 281).

[13] In the instant case we agree with the prosecution that the learned judge had fairly and justly weighed the evidence of the first and third appellants' defence to reach a just result. However, the judgment in respect of the second appellant is in breach of *Radhi*'s directions for reasons we have stated earlier and for all practical purpose it is not a safe judgment, (see *Thenegaran a/l Murugan & Anor v Public Prosecutor* [2013] 2 MLJ 855).

[14] In consequence the conviction and sentence against the second appellant is set aside and the second appellant is acquitted and discharged. The first and third appellants appeal is dismissed and their convictions and sentences affirmed.

[15] We hereby order so.

Second appellant appeal allowed; first and third appellant's appeal dismissed.

Reported by Afiq Mohamad Noor